

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

PROVIDENCE HEALTH PLAN, )  
Plaintiff, )  
v. ) No. CV-08-872-HU  
LINDA L. CHARRIERE and PAUL )  
H. KRUEGER LAW FIRM, P.C. ) OPINION & ORDER  
Defendants. )

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HUBEL, Magistrate Judge:

Plaintiff Providence Health Plan brought this action against

1 defendant Linda Charriere<sup>1</sup>, under the Employee Retirement Income  
2 Security Act of 1974, 29 U.S.C. §§ 1001-1461 (ERISA). Following an  
3 October 13, 2009 Opinion & Order which granted in part and denied  
4 in part both plaintiff's and defendant's motions for summary  
5 judgment, and a settlement of all remaining issues except for  
6 attorney's fees, Judgment was entered on February 11, 2010.

7 Defendant now moves for an award of attorney's fees. The  
8 parties have consented to entry of final judgment by a Magistrate  
9 Judge in accordance with Federal Rule of Civil Procedure 73 and 28  
10 U.S.C. § 636(c). I deny the motion.

11 DISCUSSION

12 Plaintiff brought several claims in this action: a claim for  
13 constructive trust under 29 U.S.C. § 1132(a)(3), a supplemental  
14 state claim for breach of contract, and then separate claims for  
15 prejudgment interest and attorney's fees. Defendant brought four  
16 counterclaims: intentional infliction of emotional distress,  
17 breach of the implied covenant of good faith and fair dealing, an  
18 action to recover insurance proceeds, and an action on an insurance  
19 contract.

20 The claims involved plaintiff's attempt to recover \$100,000  
21 paid by State Farm Insurance to defendant as a result of injuries  
22 defendant received in a car accident caused by a third party. The  
23 \$100,000 represented \$50,000 paid by State Farm to defendant as  
24 underinsured motorist coverage (UIM) under defendant's policy with  
25 State Farm, and \$50,000 paid by State Farm as third party liability

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<sup>1</sup> A Stipulation of Dismissal as to defendant Paul H.  
28 Krueger Law Firm, P.C., was entered on October 6, 2008 (dkt #6).

1 coverage insurance because State Farm was third party's insurer.

2 In the pleading setting forth her Answer to the Complaint, and  
3 her counterclaims, defendant demanded a jury trial. Plaintiff  
4 moved to strike the jury trial demand on the basis that none of  
5 plaintiff's claims allowed a jury trial and all of defendant's  
6 claims should be preempted by ERISA. I agreed with plaintiff and  
7 granted plaintiff's motion in a May 5, 2009 Opinion & Order.

8 As explained more fully in that Opinion, I concluded that  
9 because all four counterclaims had a connection to, or referred to,  
10 the health insurance plan at issue in the ERISA claim, the  
11 counterclaims all "related" to the ERISA claim and were thus  
12 preempted by the ERISA claim. May 5, 2009 Op. & Ord. at pp. 10-11.  
13 Although the ruling came in the context of a motion to strike the  
14 jury demand for those claims, and thus did not formally dismiss  
15 them at the time, it is clear that the counterclaims were no longer  
16 in the case as of May 5, 2009.

17 The parties both moved for summary judgment on the ERISA  
18 claim. In the October 13, 2009 Opinion & Order, I concluded that  
19 plaintiff was entitled to summary judgment on the ERISA claim to  
20 the extent plaintiff sought recovery of the payment by State Farm  
21 to defendant of UIM proceeds. I concluded that defendant was  
22 entitled to summary judgment on the ERISA claim to the extent  
23 plaintiff sought recovery of the payment by State Farm to defendant  
24 of third party liability funds. Thus, I granted and denied each  
25 party's summary judgment motion.

26 Defendant now seeks attorney's fees pursuant to Oregon Revised  
27 Statute § (O.R.S.) 742.061 which provides that

28 [i]f settlement is not made within six months from the

date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon.

O.R.S. 742.061(1).

In her Answer and Counterclaims, defendant pleaded entitlement to fees under O.R.S. 742.061(1) as part of her "Action to Recover Insurance Proceeds" and "Action on Insurance Contract" Counterclaims. Answer at ¶¶ 34, 37. However, as explained above, these claims were effectively dismissed from the case in May 2009 because they were preempted by the ERISA claim. Moreover, at summary judgment, neither party moved as to either of these claims, no decision was made about either of these claims, and defendant thus did not prevail on either of these claims. Because defendant did not prevail on the claims on which she sought O.R.S. 742.061 fees, she is not entitled to such fees.

Additionally, while defendant did prevail on a portion of plaintiff's ERISA constructive trust claim, defendant did not plead any entitlement to fees under the ERISA fee provision found at 29 U.S.C. § 1132(g), and she has not attempted to prove her entitlement to fees under that statute. Even if defendant had sought fees under section 1132(g), I would not exercise my discretion in favor of an award. For the reasons noted in the following paragraph, this action is not properly characterized as one brought by a participant or beneficiary to obtain unpaid benefits. Here, defendant received the funds and then her access to them was temporarily tied up because of the need to resolve a legitimate legal issue regarding which party should ultimately

1 obtain the funds. This is not a situation where attorney's fees  
2 should be awarded under section 1132(g).

3 Finally, even if the claims on which defendant pleaded a right  
4 to fees under O.R.S. 742.061(1) were not preempted, the statute  
5 would not apply here in any event. By its terms, O.R.S. 742.061(1)  
6 gives an insured the right to collect attorney's fees from an  
7 insurer, including plaintiff, when a "proof of loss" is filed with  
8 the insurer and when an action against upon any policy of insurance  
9 is brought more than six months later and the insured's recovery  
10 exceeds the amount of any tender made by the insurer. In the  
11 instant case, there is no evidence in the record showing that a  
12 proof of loss was ever filed and nothing to suggest that the claims  
13 in this case ever involved a dispute concerning any proof of loss  
14 defendant made against plaintiff. Rather, the issue in this case  
15 concerned whether plaintiff was entitled to be reimbursed for the  
16 coverage it had already provided to defendant in the form of more  
17 than \$240,000 in medical expenses, by the amounts that defendant  
18 successfully obtained from a third-party carrier. By its terms,  
19 O.R.S. 742.061 applies when an insured has been denied the coverage  
20 the insured is entitled to under a policy it has with an insurer  
21 and then proves, in an action on that policy, the insurer's  
22 obligation to make payment to its insured. The statute does not  
23 apply here.

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1 CONCLUSION

2 Defendant's motion for attorney's fees (#68) is denied.

3 IT IS SO ORDERED.

4 Dated this 21st day of May, 2010.

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7 /s/ Dennis James Hubel  
8 Dennis James Hubel  
United States Magistrate Judge  
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